

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1109

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

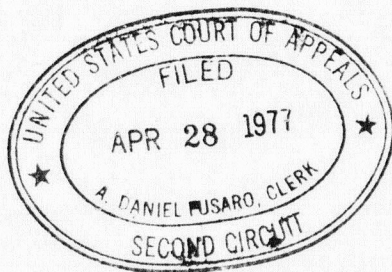
RAYMOND RICARD,

Appellant.

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Docket No. 77-1109

BRIEF FOR APPELLANT
RAYMOND RICARD

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the superseding indictment covering the same conduct as the petty offense originally charged posed a realistic likelihood of "vindictiveness" for appellant's decision to proceed to trial and contravened the due process clause.

2. Whether the mere observation of a tin foil package in appellant's pocket constituted insufficient cause to justify the seizure.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Thomas P. Griesa) rendered on February 23, 1977, after a non-jury trial, convicting appellant of possession of stolen mail (18 U.S.C. §1708) (76 Cr. 776, Count I). Appellant was sentenced to a two year term of imprisonment, six months to be served in a jail-type institution and 18 months to be served on probation. Execution of the sentence was stayed pending the determination of this appeal.

By order of this Court dated March 9, 1977, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On August 19, 1976, an information* was filed charging appellant with the petty offense of obstruction of mail on the ground that on March 13, 1976, he had taken two books of money orders from the mail.

*The information is "B" to the separate appendix to appellant's brief.

A. The Hearing Upon Appellant's Motion to Suppress Physical Evidence

1. The People's Case

Thomas Kelleher, a New Jersey policeman with 5-1/2 years of experience, saw appellant's car speeding on the New Jersey turnpike at 6:30 P.M. on March 13, 1976 [H15].* At the officer's direction, appellant parked his car on the side of the road and both men got out of their vehicles [H16, 20]. Appellant produced his license and registration, which appeared to be in order, and asked for leniency because he was a postal worker [H16]. As appellant reached into his jacket pocket for some identification, the officer observed a tin foil packet. In response to the patrolman's inquiry as to what was in the packet, appellant replied "nothing" [H16-17].

Patrolman Kelleher, suspecting that the tin foil contained drugs, removed it from appellant's pocket, opened it up and, finding a white powder, placed appellant under arrest [H16-17]. If the officer had not seen the packet, he would have given appellant a summons and not searched or arrested him [H50-51].

Appellant said that the man in the car with him was a mechanic and was not involved with the drugs. This appeared true, for the officer observed tools in the vehicle [H17]. The officer took appellant to the station house where a search

*"H" refers to the minutes of the suppression hearing, dated October 5 and 6, 1976; "A" and "B" refer to the minutes of December 15 and 20, 1976, respectively; "T" refers to the minutes of trial dated December 21, 1976 and "S" to the minutes of sentencing, dated February 23, 1977.

uncovered two books of money orders which had not been filled out [H17]. Appellant claimed to have obtained the money orders from a man on the street in New York and was bringing it to Philadelphia [H17].

2. The Defense

Appellant and Santiago Negron (the passenger in the car) contradicted Patrolman Kelleher's version of the events. They both testified that appellant had been seated in his car when the officer approached and asked for the license and registration [H4, 40]. The patrolman then ordered appellant out of the car and, in the course of a frisk, discovered the tin foil packet [H4-5].

3. The Court's Decision*

The court rejected the defense version of the facts and credited the testimony of Patrolman Kelleher. Judge Griesa denied the motion to suppress, finding that when appellant reached into his coat, the patrolman observed the foil package, which appellant said was "nothing." The patrolman, suspecting that the packet contained narcotics, took it out of the pocket, opened it up and discovered cocaine. Appellant was frisked and then taken to the station house where a further search uncovered the American Express checks [H68-70].

*The court's oral opinion is "D" to the separate appendix to appellant's brief.

B. The Superseding Indictment

On December 14, 1976, a superseding indictment* was filed (S 76 Cr. 776) charging appellant with the felony of unlawful possession of the two books of money orders knowing that they had been stolen from the mail (18 U.S.C. §1708). The petty offense of obstruction of mail, which had been charged in the information, was included as the second count of the indictment. a pretrial conference on the following day, Assistant United States Attorney Parver explained the circumstances under which the indictment was obtained:

I do know I spoke with Mr. Curley [defense counsel] about a week ago and asked whether his defendant was prepared to go to trial and Mr. Curley said yes, and I said in that case I am informing you that the government is bringing a superseding indictment.

[A3]

Ms. Parver also noted that she had reviewed the file and assured the court that, because of the value of the money orders, "it was clearly an instance in which the government normally would ask a grand jury to vote a §1708 indictment" [A8]. Though the speedy trial period was drawing to a close and the trial was scheduled for the following week, the prosecutor argued that the late indictment would not prejudice the defense because

... the pattern underlying the two different counts is essentially the same so

*The indictment is "C" to the separate appendix to appellant's brief.

that it isn't a question of introducing any more evidence in the trial or surprising the defendant with any kind of other transaction.

[A13]

Defense counsel, who had just been handed a copy of the indictment, noted that "it is basically the same charge, elevated from a petty offense to a felony..." [A6] and objected to the added count "as a potential penalty...for defendant's exercising his right to trial" [A7].

On December 20th, at a pre-trial conference, counsel announced that he had drafted a motion and memorandum of law to dismiss the felony count on the ground of government vindictiveness [B5-6]. The prosecutor again stated that "the indictment and the information were both drafted under the belief that the government would be able to prove that he [appellant] took these things from the mail" [B10]. Then, the government suddenly changed theories and asserted that the real reason for the change in the charge was that Assistant United States Attorney Lawlor had just discovered over the weekend that appellant could not have taken the money orders from the mail himself but must have obtained them from someone else [B8-11]. The prosecutor moved to dismiss the obstruction of the mail charge and to proceed solely upon the felony count [B9].

On the following day, after the filing of appellant's motion papers, the government again argued* that the superseding

*The court postponed argument of the motion until after the trial [T2].

indictment was justified by its subsequent discovery that it could not proceed on the obstruction count [T55-58]. Though counsel reminded the court that the government had not discovered a new theory until after the filing of the indictment [T59], Judge Griesa concluded that the prosecution had taken the "reasonable precaution" of including "in the indictment two types of theories, one possession, and one obstruction" [T59]. The court then denied the motion in the following oral opinion:

... I could be wrong but I don't need to have further argument on this. I am going to deny the motion. I would rule that from all the evidence before me this is an instance where a case was brought by way of information, as trial approached the United States Attorney had second thoughts and brought an indictment including two counts instead of the one-count information, and as the trial finally approached they realized that they could not go on the obstruction count, they could only go on the possession count and I think that the evidence justifies their judgment.

[T59-60]

C. The Trial

The government presented two witnesses at the non-jury trial -- Patrolman Kelleher and Robert De Muro (a postal inspector). The arresting officer's testimony was essentially the same as his version at the suppression hearing except that he was not certain whether he had taken the tin foil packet from appellant's pocket (as he testified earlier) or whether appellant had handed it over at the officer's direction [T7, 19].

Inspector De Muro testified that appellant, a postal car-

rier for almost seven years, claimed to have found the two books of money orders in the back of his mail truck [T26-27].

Judge Griesa found appellant guilty of possession of money orders stolen from the mail (18 U.S.C. §1708) and dismissed the count of obstruction of the mail (18 U.S.C. §1701) [T65-66].*

On February 23, 1977, the court denied appellant's motion in arrest of judgment, which again argued that the defendant had been penalized for exercising his right to trial [S2]. Though appellant had no prior criminal record, Judge Griesa sentenced him to a two year term of imprisonment, six months to be served in a jail-type institution and 18 months to be served on probation [S2, 4].

*The court's findings are "E" to the separate appendix to appellant's brief.

ARGUMENT

POINT I

THE SUPERSEDING INDICTMENT COVERING THE SAME CONDUCT AS THE PETTY OFFENSE ORIGINALLY CHARGED POSED A REALISTIC LIKELIHOOD OF "VINDICTIVENESS" FOR APPELLANT'S DECISION TO PROCEED TO TRIAL AND CONTRAVENED THE DUE PROCESS CLAUSE.

Appellant's arrest took place on March 13, 1976, and on August 19, 1976, he was charged in an information with the petty offense of obstruction of mail (18 U.S.C. §1701). A suppression hearing took place on October 5 and 6, 1976, with no subsequent negotiations or discussions concerning the entry of a plea. The uncontradicted record reveals that two months after the suppression hearing and shortly before the end of the speedy trial period, the Assistant United States Attorney called the defense attorney and inquired "whether his defendant was prepared to go to trial." When counsel answered "Yes," the prosecutor said, "in that case I am informing you that the government is bringing a superseding indictment" [A3]. The prosecutors at both pre-trial conferences admitted that the felony charge in the indictment was based upon the identical acts and the same theory of the case as the petty offense charged earlier in the information [A13, B10]. Under these circumstances, the increase in the charge from a petty offense to a felony created "a realistic likelihood of [prosecutorial] vindictiveness" (Blackledge v. Perry, 417 U.S. 21, 27 (1974))

that deprived appellant of due process of law as guaranteed by the Fifth Amendment.

In Blackledge v. Perry, supra, the Supreme Court applied the due process principles set forth in North Carolina v. Pearce, 395 U.S. 711 (1969), forbidding increased penalties which inhibit the exercise of constitutional rights, to prosecutorial conduct. The court held in Blackledge, supra at 28, that "[a] person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." To show a violation of due process, the accused need not prove actual vindictiveness by the prosecutor, but merely "an apprehension on the defendant's part of receiving a vindictively imposed penalty for the assertion of rights." United States v. Jamison, 505 F.2d 407, 415 (D.C. Cir. 1974) (emphasis in original), cited in United States v. Butler, 414 F.Supp. 394, 395 (D. Conn. 1976); see United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976).

The prosecutor's action in substituting a felony charge for a petty offense certainly created the apprehension of vindictiveness. The Assistant United States Attorney virtually admitted that her decision to file a superseding indictment was triggered by appellant's refusal to plead guilty and the assertion of his right to go to trial.

Under the Blackledge line of cases, a higher charge could

only be justified by "intervening events or by new evidence of which the government was excusably unaware at the time of the first indictment." United States v. Jamison, supra at 417; see also, Blackledge v. Perry, supra at 29 n.7; United States v. Mallah, 503 F.2d 971, 988 (2d Cir. 1974); United States v. Gerard, 421 F.2d 1300, 1306 (9th Cir. 1974). The prosecutor first argued that she had reconsidered the file and decided that this was "clearly an instance in which the government normally would ask a grand jury to vote a \$1708 indictment" [A8]. Realizing that this claim, lacking any objective factors, was inadequate under Pearce and Blackledge, the prosecution discarded the argument at the next pre-trial conference.

The government then claimed that it acted properly in "upping the ante" through a felony indictment" (Blackledge, supra at 28) because it could not prove the lesser count of obstruction of the mail (see [T55-58]). As counsel bel w vainly sought to remind the court [T59], the prosecutor admitted that this discovery had not been made until some time subsequent to the filing of the indictment (see Lawlor: B8-11) and that it therefore could not have been the reason for the filing of the indictment. Moreover, even if the government had known at the time of the indictment that appellant could not have taken the money orders, this would still not justify the raising of the charge to a felony. The prosecution could have merely amended the language of the obstruction of the mail count in the information by charging appellant with possession of money orders

which he knew had been stolen from the mail rather than with taking the papers himself. The anomaly of increasing the penalty upon a discovery that appellant was derivatively, rather than primarily, liable for the mail theft must be ascribed to the prosecutor's imagination and not to the statutory scheme.

The court's finding that the prosecution had included two different theories in the indictment [T59] is totally unsupported by the record. Indeed, it was refuted by the statements of the prosecutors at the pre-trial conferences. Assistant United States Attorney Parver had acknowledged that "the pattern underlying the two different counts is essentially the same..." [A3] and Frank Wohl (Deputy Chief of the Criminal Division) noted "that the indictment and the information were both drafted under the belief that the government would be able to prove that he took these things from the mail" [B10]. Thus, appellant was charged "with a more serious offense based upon the same conduct." United States v. Mallah, supra, 503 F.2d at 288 (2d Cir. 1974); United States ex rel. Williams v. McMann, 436 F.2d 103, 105 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).

Appellant was entitled to pursue his right to a trial without apprehension that the government would retaliate by substituting a more serious charge for the original one. See Blackledge, supra at 28. The indictment must therefore be dismissed.

POINT II

THE MERE OBSERVATION OF A TIN FOIL PACKAGE IN APPELLANT'S POCKET CONSTITUTED INSUFFICIENT CAUSE TO JUSTIFY THE SEIZURE.

Patrolman Kelleher stopped appellant's car for speeding on the New Jersey turnpike and, upon finding his license and registration in proper order, would normally have issued a summons and permitted appellant to leave the scene. However, when the patrolman observed in appellant's pocket a tin foil packet, which the latter characterized as "nothing," the patrolman seized the package and opened it up. The patrolman's "hunch" that the package contained narcotics was inadequate to support the intrusion upon appellant's personal security. Thus, the court erred in denying the motion to suppress the money orders discovered in appellant's possession as a result of the unconstitutional search.

To justify the seizure of the package under the standards of the Fourth Amendment, the police officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Magda, 547 F.2d 756, 758 (2d Cir. 1976). Here, as in Sibron v. New York, 392 U.S. 40, 62-63 (1968), "[n]othing resembling probable cause existed until after the search" uncovered the narcotics. The patrolman had never seen appellant before; he had not received any tips from informers, seen any suspicious behavior or overheard any incriminating conversations. Appellant's remark that the packet was "nothing" was not suspicious

and the patrolman made no claim that it was. The patrolman gave no reason for his failure to believe appellant's reply that the package did not contain any contraband. Patrolman Kelleher did not claim to have any training in narcotics or to have made any drug arrests. He did not allege that the New Jersey turnpike was noted for its narcotics traffic or that he had ever heard of drugs being transported there in tin foil wrappers. Moreover, the observation of an aluminum foil package does not, in itself, provide probable cause (People v. Abdelah, 41 A.D.2d 667 (2d Dept. 1973)), for a myriad of commonplace items are wrapped in tin foil.*

Patrolman Kelleher's conduct was no more justified than that of the officer in Sibron, supra, who after seeing the defendant speak to several addicts, reached into Sibron's pocket and pulled out envelopes of heroin. In both cases, the action observed was as susceptible of innocent as of criminal activity and was insufficient to support the intrusion. The order of the court below should be reversed and the evidence ordered suppressed.

*The paucity of information possessed by the patrolman at the time of the seizure is highlighted by comparing Patrolman Kelleher's knowledge to that of the officers, whose searches were upheld in United States v. Santana, 485 F.2d 365 (2d Cir. 1973); United States v. Canieso, 470 F.2d 1224 (2d Cir. 1972); United States v. Moon, 351 F.2d 464 (2d Cir. 1965), cert. denied, 383 U.S. 929 (1966); and United States v. Devener, 332 F.2d 160 (2d Cir. 1964). In all these cases, the officers not only saw glassine envelopes or brown paper bags, but were familiar with the individuals involved, had tips from informants, overheard conversation or observed furtive conduct.

Conclusion

For the foregoing reasons, the judgment of the district court should be reversed and the indictment dismissed (Point I); alternatively, the evidence should be ordered suppressed and the indictment dismissed (Point II).

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 25 , 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassis